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No. _____

Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED
STATES

October Term, 1990

DAVID ENIX, JAMES MEHAFFIE, DAVID
MEHAFFIE,
DOUGLAS SAPP, KYM MEHAFFIE and
H.F. PERKINS, *Petitioners*,

v.

THE DAYTON WOMEN'S HEALTH CENTER, INC.,
K. W. DAVIS, MD, and ROBERT SKIPTON, MD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

1. Whether a permanent injunction based upon the content of the speech and not narrowly tailored to serve a compelling state interest may prohibit peaceful assembly and picketing on a public sidewalk.

2. Whether a permanent injunction may bind persons who have not engaged in any tortious activities, were not acting in concert with named defendants, have not received notice and had no opportunity to be heard.

LIST OF PARTIES

The parties to the proceedings below were the petitioners David Enix, James Mehaffie, David Mehaffie, Douglas Sapp, Kym Mehaffie and H.F. Perkins.

The respondents before this Court include The Dayton Women's Health Center, Inc., K.W. Davis, MD, and Robert Skipton, MD.

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v.

**THE DAYTON WOMEN'S HEALTH CENTER, INC.
K.W. DAVIS, MD and
ROBERT SKIPTON, MD, *Respondents*.**

**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO**

The petitioners David Enix, *et al*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio, entered in the above-entitled proceeding on July 25, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 52 Ohio St.3d 67, 555 N.E.2d 956 (1990). The opinion of the Court of Appeals of Montgomery County, Ohio, Second Appellate District is unreported. The decision of the Common Pleas Court for Montgomery County, Ohio which ordered a permanent injunction against the Petitioners and the Defendant class is unreported. The decision of the Common Pleas Court for Montgomery County, Ohio which certified the defendant class and issued a preliminary injunction against the Petitioners and the defendant class is unreported.

JURISDICTION

— — — The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

The opinion of the Supreme Court of Ohio was entered on June 20, 1990. Petitioners filed a timely

Application for Rehearing in the Supreme Court of Ohio on July 2, 1990. On July 25, 1990, the application was denied. This petition has been filed within ninety days of the entry of judgment overruling the Petitioners' Application for Rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

This case raises issues under the Free Speech Clause of the First Amendment to the United States Constitution, which provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In addition, this case raises issues under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States

Constitution, which provides:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural Posture

This case arises from the appeal of a permanent injunction issued against Petitioners and a Defendant class which restricts speech activity in the vicinity of an abortion clinic.

On October 14, 1986, Plaintiffs-Respondents (Respondents), The Dayton Women's Health Center, Inc. (DWHC), K.W. Davis, MD, and Robert Skipton, MD, filed a Complaint, later amended, requesting

injunctive relief and damages against Defendants-Petitioners (Petitioners) and a defendant class. On January 15, 1987, the trial court certified a defendant class defined as "all individuals protesting the activities conducted at The Dayton Women's Health Center . . . who have been personally served with this entry." *Dayton Women's Health Center v. Enix*, No. 86-3120, slip op. at 4 (C.P. Montgomery Co., Ohio, Jan. 15, 1987). Petitioners were designated class representatives. The parties later submitted the case on the evidence presented and Respondents withdrew their request for damages.

A permanent injunction was issued on July 10, 1987 forbidding Petitioners and all other persons who protest the activities of DWHC (*i.e.* abortion) from, *inter alia*, verbal communications with employees, staff or volunteers of DWHC; picketing in any form at or within view of the homes of patients, employees, staff or volunteers of DWHC; picketing at or within view of the offices of physicians performing services at DWHC in groups of more than five individuals; and picketing

within view of DWHC anywhere except the public sidewalk directly in front of the clinic by more than ten persons. *Dayton Women's Health Center*, No. 86-3120, slip op. at 3-4 (C.P. Montgomery Co., Ohio, Jul. 10, 1987).

"Picketing" includes, but is not limited to "parading, parking or any other form of demonstration." According to the order of July 10, "picketing goes to the mere presence of an individual." *Id.*, at 4-5.

Petitioners filed a timely notice of appeal challenging the propriety of the injunction. On December 5, 1988, the appellate court voted 2 to 1 to uphold the injunction. The dissenting judge voted to reverse and remand the case.

The appellate court did not address the merits of Petitioners' primary assignment of error challenging the propriety of certifying the defendant class and of issuing an injunction against the class. The appellate court determined that appeal of the class certification issues had been forfeited by Petitioners' failure to immediately appeal the January 15, 1987 order certifying the class

and issuing a preliminary injunction against it.¹ The appellate court did not address arguments made by Petitioners in which they asserted that an injunction could not be issued against a defendant class of "individuals protesting."

On January 9, 1989, Petitioners filed a notice of appeal and a motion for the appellate court to certify the case to the Supreme Court of Ohio because of conflicts between the decision and the decisions of other Ohio appellate courts.² An order granting the motion

1 Under Ohio law certain interlocutory orders can be appealed prior to final judgment pursuant to the "final order in special proceedings" doctrine. Ohio Rev. Code Sec. 2505.02. This doctrine, which is analogous to the federal "collateral order" doctrine, permits the immediate appeal of certain orders based on a balancing test when the need for immediate review (because meaningful review may not be practicable after final judgment) outweighs piecemeal appeals. Prior to the instant case the Supreme Court of Ohio had not ruled on the appealability of the certification of a *defendant* class. The only court which had addressed the issue was the Court of Appeals of Hamilton County, in *Planned Parenthood Association of Cincinnati v. Project Jericho*, Case No. C- 860430 (1st Dist. Ct. App. 1986). *Planned Parenthood* held that an order certifying a defendant class was not immediately appealable under Ohio's special proceedings doctrine. Petitioners' relied on *Planned Parenthood* in not filing an immediate appeal of the class certification.

for certification was issued on January 27, 1989, and filed in the Supreme Court of Ohio on February 6, 1989.

On June 20, 1990 the Supreme Court of Ohio affirmed the appellate court's decision regarding the appealability of an order certifying a defendant class. The Supreme Court of Ohio declined to address the merits of the constitutional issues that were presented to it.

On July 2, 1990, Petitioners filed an Application for Rehearing and requested, among other things, that the court rule on all the constitutional issues presented. This application was denied on July 25, 1990.

2 Under Ohio law, an appellate court is required to certify a case for review to the Supreme Court of Ohio when it finds that its decision conflicts with the decision of another Ohio appellate court. Ohio Const. art. IV, 3(B)(4). When a case is certified to the Supreme Court of Ohio , all of the issues are brought before that Court, not just the issue in conflict. *E.g., State v. Volpe*, 38 Ohio St. 3d 191, 192, 527 N.E.2d 818, 819 (1988); *State v. Young*, 37 Ohio St. 3d 249, 525 N.E.2d 1363 (1988). The Court of Appeals for Montgomery County found its holding that an interlocutory order certifying a defendant class was immediately appealable was in conflict with the decision in *Planned Parenthood Association of Cincinnati v. Project Jericho* (see footnote one *supra*) and therefore certified the case to the Supreme Court of Ohio.

B. Statement of Facts

DWHC is an abortion clinic located in a commercial area in Dayton, Ohio. The other two Respondents work at DWHC and have a private office elsewhere. DWHC is housed in a three-story building that is approximately 70 feet from the public street (South Dixie Drive) and the sidewalk it faces. The building is owned by DWHC's director. DWHC occupies the top two floors.

In May and June of 1986, Petitioners began picketing at DWHC on Tuesdays and Fridays for one to two hours each day. The number ranged from 8 to 20 picketers, with an average of 12. Picketers changed from day to day and no group or person sponsored or organized the picketing. There was never a crowding problem on the sidewalk in front of DWHC.

Although Respondents' complaint alleged violent conduct, the trial court included no violent acts in its

findings. *Dayton Women's Health Center*, at 4-5. Five of the six Petitioners were accused of trespassing on a parking lot in front of DWHC. The alleged instances of trespassing were rare, harmless and often disputed. Although Respondents alleged that access to DWHC had been obstructed by picketers on occasion, no one was ever prevented from entering or leaving DWHC. To avoid any possible blocking problem, picketers discontinued patrolling on the sidewalk in front of the driveway leading into DWHC three months before the suit was filed.

There was no evidence that class members engaged in any tortious conduct. Other evidence at trial concerned unidentified and unknown persons, which was admitted over Petitioners' objections because this was a "class action."

REASONS FOR GRANTING THE WRIT

This case involves an unprecedented viewpoint-based injunction which is unconstitutional in that it enjoins persons based simply on whether their speech protests abortion. The injunction is not supported by any compelling state interest. Those enjoined are not accused of any wrongdoing. The only notice allowed them was to be served on location by members of the Respondent's staff. An adjudication of the First Amendment rights of present and future class members occurred before they had notice, and before they had an opportunity to be heard.

I.

The permanent injunction directly contravenes the First Amendment guarantees of free speech and free assembly in that it is a content-based restriction on political speech in a public forum and is not narrowly tailored to serve a compelling state interest.

The Supreme Court of Ohio has created law which is opposed to the U.S. Constitution and the

settled precedents of this Court. By allowing the injunction to stand, Ohio's court of last resort has undermined the mandates of the highest court in the nation. Such an affront to the Constitution deserves this Court's attention.

The injunction in the instant case is directly analogous to the invalid statute in *Boos v. Barry*, 485 U.S. 312, 99 L.Ed.2d 333, 108 S.Ct. 1152 (1988). The statute at issue in *Boos* prohibited, within 500 feet of any foreign embassy, picketing in protest of the government represented by the embassy. The Court struck down the anti-picketing statute as a content-based restriction unsupported by any compelling state interest. The injunction here, like the invalid statute in *Boos*, prohibits core First Amendment expression - classic political speech. Time and again this Court has declared that such prohibitions are constitutionally unsound:

We have recognized that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide open," *New York Times*

v. Sullivan, 376 U.S. 254, 270, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964)...This has led us to scrutinize carefully any restrictions on public issue picketing.

Id. at 318,

The injunction forbids speech protesting abortion on the public sidewalk, the streets, and on the private property of others within view of the DWHC, despite the fact the protesters have the permission of the private property owners.

Public streets and sidewalks, as noted in *Boos*, are especially protected public fora, which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 83 L.Ed. 1423, 59 S.Ct. 954 (1939).

The statute in *Boos* forbade picketing expressing a certain viewpoint. As the Court noted,

Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely

prohibited within 500 feet of embassies. Other categories of speech, however, are permitted.

Id., at 318-319

Though the Respondents in *Boos* contended that the statute was content-neutral, this Court found otherwise. There can be no viewpoint-based restrictions of free speech in the public forum which are not narrowly tailored to serve a compelling state interest. In the instant case the permanent injunction forbids:

1. Picketing anywhere within view of the DWHC except the public sidewalk in front of the clinic.
2. The injunction does not allow more than 10 persons to protest by "mere presence" on that public sidewalk.
3. Only speech protesting abortion is prohibited.
4. Petitioners may not protest on private property with the owner's permission, if that property is within view of DWHC.
5. Individuals or groups may gather anywhere within view of DWHC to protest about any other issue, or to picket in favor of abortion. Such persons would be free to speak with employees or patients of the clinic. Only protest against abortion is prohibited.

This injunction far exceeds the restrictions struck down in *Boos*. The Ohio courts have gone beyond violating mere content-neutrality; they have extended their reach to exclude a disfavored viewpoint about abortion. See also *United States v. Grace*, 461 U.S. 171, 75 L.Ed.2d 736, 103 S.Ct. 1702 (1983); *Carey v. Brown*, 447 U.S. 455, 65 L.Ed.2d 263, 100 S.Ct. 2286 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972).

Ruling on the statute in *Boos* this Court cited *Perry Educators Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 103 S.Ct. 948 (1983), for the contention that content-based restrictions on speech in the public forum are valid only if they are necessary to serve a compelling state interest; further, they must be narrowly drawn to serve that interest. *Boos*, at 321. See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L.Ed.2d. 1215, 102 S.Ct. 3409 (1982); *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 93 L.Ed.2d 539, 107 S.Ct. 616 (1986); *Clark v. Community for Creative Non-*

Violence, 468 U.S. 238, 82 L.Ed.2d 221, 104 S.Ct. 3065 (1984); *Califano v. Yamasaki*, 442 U.S. 682, 61 L.Ed.2d 176, 99 S.Ct. 2545 (1979).

The injunction provides that Petitioners and class members may not: (1) be present within view of the offices of physicians performing services at DWHC in groups of more than five, (2) be present at any other location within view of DWHC other than the sidewalk bordering the east side of the sidewalk in front of DWHC, or (3) be present within view of DWHC in groups of more than ten. *Dayton Women's Health Center, supra*, at 3-4. Petitioners cannot drive past DWHC at any time for any reason because, as the order states, "picketing goes to mere presence." Further restrictions prohibit Petitioners from being merely present at any residence or commercial establishment within view of DWHC for any purpose, including constitutionally protected activity or legitimate business purposes. Such overbroad restrictions are anything but narrowly tailored.

The only rights involved in this case are those of private parties - the DWHC, their staff or their patients. The Supreme Court of Ohio, without any compelling state interest being at stake, failed to reverse an overbroad and vague injunction restricting the free speech of all persons who protest abortion in the public forum.

In *NAACP v. Claiborne Hardware Co., supra*, this Court held that "the right to associate does not lose all constitutional protection merely because some members of the group have participated in conduct or advocated doctrine that is itself not protected." *Id.*, at 908. The Court added that:

Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.

Id. at 909-910

The overbroad injunction upheld by the Supreme Court of Ohio flies in the face of the Supreme Court's mandate in *Claiborne Hardware*. An order so at odds with clearly delineated constitutional guidelines requires correction by this Court.

II.

The injunction violates the Due Process rights of absent class members by adjudicating their rights to free speech without notice or opportunity to be heard.

This content-based injunction, unsupported by any compelling or substantial state interest, prevents persons who have never been accused or found guilty of any wrongdoing from exercising their rights to free speech. Class members enjoined were neither notified of the action against them nor afforded an opportunity to defend their individual rights in court before the order was entered. The Ohio courts have, in fact, delegated the authority to serve notice on potential

defendant-class members to the employees of a party in interest to the case -- DWHC. The potential for abuse entailed by leaving this discretion in the hands of one side of the adversarial process is frightening.

The injunction violates Petitioners' due process rights when it presumes "to make punishable the conduct of persons who act independently [from the parties] and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, 89 L.Ed. 661, 85 S.Ct. 478 (1945). Judge Learned Hand explained in *Alemite Manufacturing v. Staff*, 42 F.2d 832, 832-22 (2d Cir. 1930), why an injunction cannot bind non-parties who act independently: A court "is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it has personal service, and who therefore have their day in court." *Alemite* was followed by this Court in *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37, 78 L.Ed. 894, 54 S.Ct. 475 (1934), which held it to be error to extend an

injunction to "all persons to whom notice of the injunction should come." This Court observed:

[B]y extending the injunction to "all persons to whom notice of the injunction should come," the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law To subject them to such peril violates established principles of equity jurisdiction and procedure.

Id.

The injunction violates that standard because it purports to bind anyone served with it who protests DWHC's activity even though they (1) are non-parties, (2) received no notice of the lawsuit, (3) did not have their day in court in a proceeding adjudicating their personal rights, and (4) act independently of the parties. The injunction, therefore, deprives such people of their liberty without affording due process of law.

The due process violations are even more egregious because the injunction restricts and threatens with contempt innocent non-parties whose only defining

characteristic is that they have engaged in free speech activity, as defined by the court, within view of DWHC. In *Claiborne Hardware, supra*, this Court specifically recognized that such innocent persons cannot be so enjoined. In sharp disregard of this clear precedent, the Ohio courts have assumed that parties who have committed no tortious acts and have no connection with the named Petitioners may still be held in contempt under the injunction. That the persons so enjoined engaged in nothing more than constitutionally protected activities appears to be no defense. The Ohio state courts have assumed that anyone's free speech may be enjoined if they are merely present and are perceived by DWHC staff members as sharing the viewpoints of the Petitioners regarding abortion.

CONCLUSION

Clearly this nation is deeply divided over the issue of abortion. The public sidewalk, as the quintessential public forum, plays an integral role in this continuing debate. As it stands, this injunction allows state courts to hold hostage federal constitutional rights, inhibiting the open and robust exchange of ideas. This cannot continue, though continue it will as the state courts ignore free speech rights in disregard of clear Supreme Court precedents. This case is unprecedented because the primary purpose of the injunction in question is to specifically prohibit the expression of one viewpoint. If the First Amendment is to have any force at all, it must protect free speech rights from being circumvented solely because the one seeking to exercise them does so within view of those who disagree with the ideas expressed. That however is precisely what this injunction seeks to do. It excludes from the public forum one voice and one voice only: that of the person protesting abortion. For these and the various reasons

previously cited, Petitioners pray that the writ of certiorari be granted.

Respectfully submitted,



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